

FLORIDA DEPARTMENT of STATE

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Governor

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Jeananne Gettle
Director, Water Division
U.S. Environmental Protection Agency
Region 4
Atlanta Federal Center
61 Forsyth Street, Sw
Atlanta, GA 30303-3104

December 7, 2020

RE: DHR Project File No.: 2020-7089, Received by DHR: November 19, 2020
Section 106 Review for the EPA's Approval of the State of Florida's Request to Assume Clean Water Act (CWA) Section 404 Permitting Program, Draft Programmatic Agreement

Ms. Gettle:

Our office reviewed the draft programmatic agreement (PA) provided to our office on November 19, 2020 and participated in the consultation meeting held on December 2, 2020. Based on the draft PA and the consultation meeting our office has comments and recommendations related to the text of the PA as well as Section 106 consultation. We request that EPA address the following:

- Tribal Consultation: The comments provided by the participating Tribes during the Dec. 2 meeting indicate that additional effort is necessary on the part of the EPA to address Tribal concerns and questions. The draft PA is not clear about when EPA will initiate further consultation with Tribes or what process that consultation will follow. Although the Florida Department of Environmental Protection (FDEP) will be responsible for carrying out the day-to-day implementation of Section 404 permit reviews, the EPA will retain oversight of Florida's Section 404 program and the PA should clearly define procedures related to EPA's Tribal consultation following the assumption process.
- Plain Language Review: To explain how the PA will be implemented and the procedures it will follow, the document heavily references various federal and state laws, regulations, and agreements related to the assumption process. Although this may be legally sufficient, these references cause the PA, and the alternative process it allows, to be difficult to understand. We recommend revising the PA language so that a clear understanding of the process is stated in this agreement.
- Clarifying FDEP's Role: The PA should further clarify FDEP's role in the agreement and Section 404 assumption. As our office currently understands, the PA does not assign FDEP roles or responsibilities not already assigned to the agency under other laws, regulations, and agreements related to Section 404 assumption. The PA should clarify and explain what roles and

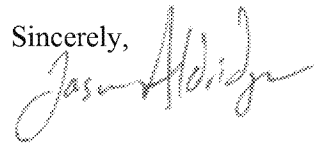
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responsibilities FDEP is acquiring relative to historic properties under other laws, regulations, and agreements.

- Human Remains Discoveries: While other laws, regulations, and agreements address how human remains will be treated under Section 404 assumption, we recommend including a stipulation addressing the applicability of NAGPRA and Section 872.05, *Florida Statutes*. This will reinforce EPA's commitment to ensuring that human remains are treated appropriately under the PA.
- Section III: Clarify that the Operating Agreement (OA) between FDEP and our office may be amended or terminated in accordance the provisions included in the OA.
- Section IV: As mentioned above, this section relies on referencing other laws, regulations, and agreements, which makes it difficult to understand the process this section is intended to explain. This section should more clearly describe when EPA will review a Section 404 permit and what process EPA will follow in those cases to ensure Section 106 is addressed for the Section 404 permits which EPA reviews.
- Section V: This section should include a reference to the Florida "Sunshine" Law, Chapter 286, *Florida Statutes*, in regards to our office's ability to withhold sensitive historic property information. It may also be appropriate to state that the OA also assures the ability for FDEP and our office to withhold sensitive historic property information.
- Section VI: This section should clarify that FDEP will submit the annual report to EPA, including specific information related to historic property reviews, as required by the Clean Water Act regulations. This section should list the historic property review information that will be addressed in the annual report. We also recommend that the EPA provide that report, along with EPA's comments, to our office, consulting parties, and the Tribes. The PA also should require EPA hold an annual meeting and establish a more thorough review at 5-year intervals.

We appreciate EPA's consultation with our office and we look forward to continuing to work with the agency to develop this programmatic agreement. If you have any questions, please contact me by email at Jason.Aldridge@dos.myflorida.com or by telephone at 850-245-6344.

Sincerely,


Jason Aldridge
Deputy State Historic Preservation Officer
for Compliance and Review